In the view we have taken it is unnecessary for us to consider the second submission made by Mr. Thuraisingham that the prosecution had failed to prove that the appellant was carrying component parts of a Sten-gun.

Appeal Allowed.

CHONG KIM SENG v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Callow, J. and Spenser-Wilkinson, J.) February 8, 1949]

[F.M. — Criminal Appeal No. 5 of 1949]

Emergency Regulations 1948, Regulation 3 — Possession of revolver — Possession of ammunition — Charges — Admissibility of Evidence — Evidence Enactment Ss. 3 and 7 — Courts Ordinance 1948, S. 29(1).

The evidence in this case showed that appellant was found standing at the entrance to a house in a clearing in the jungle carrying a small cloth bag. In the bag were found 28 rounds of revolver ammunition and one round of .303 ammunition. Inside the house were found a revolver, 6 rounds of revolver ammunition and a hand-grenade. When the Police raided the house another person was seen to run away from it. At the trial two charges were framed against the appellant, firstly, for possession of the revolver and secondly, for possession of 34 rounds of .32 revolver ammunition, 1 round of .303 ammunition and a hand grenade. After the assessors had been chosen, the learned trial Judge decided that the two charges should not be tried at one trial and the prosecution elected to proceed on the second charge only. At the trial the prosecution led evidence as to the ammunition found in the bag and in the house and also as to the revolver, which was put in as an exhibit at the trial. One of the grounds of appeal was that the evidence regarding the revolver was wrongly admitted in evidence.

Held, (1) that evidence regarding the revolver was inadmissible and should have been excluded; (2) that the prosecution should have framed separate charges relating (i) to the revolver (ii) to the 6 rounds of ammunition and the hand-grenade found on the table and (iii) to the 28 rounds of revolver ammunition and the one round of .303 rifle ammunition found in the bag; (3) that because of the wrongful admission of evidence and of the presence of other unsatisfactory features of the trial, the conviction must be quashed; (4) that in a charge of possession of ammunition, it is not necessary for the prosecution to prove that the ammunition is serviceable.

Cases referred to:—

(1) *R. v. Peckham* 25 C.A.R. 125.

(2) *Tai Chai Keh v. Public Prosecutor* (1949) M.L.J. 68.

CRIMINAL APPEAL.

C. Mills for the Appellant.

Austin (Federal Counsel) for the Respondent.

The judgment of the Court of Appeal was delivered by:—

Willan, C. J. : — In this case the prosecution filed two charges against the appellant, first being in possession of a .32 Colt revolver, and secondly with being in possession of 34 rounds of .32 revolver ammunition, 1 round of .303 rifle ammunition and a hand-grenade.

After the two Assessors had been chosen the trial Judge decided it was undesirable that the two charges should be tried together at one trial, and thereupon the prosecution elected to proceed on the second charge only — i.e. the charge relating to the ammunition and the hand-grenade.

The appellant, on being called upon to plead to that charge, claimed trial.

The sequence of events at the opening of the trial is not in accordance with the provisions of section 186 of the Criminal Procedure Code, which lays down that the plea of an accused person must be taken before the Assessors are chosen. The reason for this, of course, is that if an accused person pleads guilty and his plea is accepted, there is no need to proceed to choose any Assessors.

The evidence against the appellant on the second charge was that he was found standing at the entrance to a house in a clearing in the jungle carrying a small cloth bag. In that bag were found 28 rounds of revolver ammunition and one round of .303 ammunition. Inside the house, lying on a table, were found a revolver (the subject matter of the first charge not proceeded with at the trial), 6 rounds of revolver ammunition and a hand-grenade. These 6 rounds of ammunition and the hand-grenade found on the table were lumped together with the ammunition found on the appellant in the cloth bag and form the total of the articles incorporated in the second charge.

Both Assessors found the appellant guilty on the second charge. The learned trial Judge agreed with them and, having recorded a conviction, sentenced the appellant to death. Therefore the appellant stands convicted of being in possession of 34 rounds of revolver ammunition, one round of .303 rifle ammunition and a hand-grenade.

A significant fact, *proved by the prosecution,* in relation to the revolver, the 6 rounds of ammunition and the hand-grenade found on the table is that, when the police raided the house, another person was seen to run away from it and he was not arrested. This is important because it raises the question as to whether the evidence at the trial proved beyond reasonable doubt that the appellant was in exclusive possession of those 6 rounds of ammunition and the hand-grenade.

At the trial the prosecution led evidence as to those 6 rounds of ammunition and the hand-grenade found lying on the table. They also led evidence as to the revolver, which was put in as an exhibit at the trial, though the second charge (the only charge proceeded with at the trial) does not relate to possession of a revolver.

Mr. Mills, for the appellant, submitted that this evidence regarding the revolver was inadmissible, and that having been admitted it must have prejudiced the Assessors against the appellant and thereby he was not afforded a fair trial. He said this must be specially so because the Assessors themselves had been chosen before the appellant's plea was taken; they therefore heard the ruling by the Judge that only the second charge should be proceeded with; and consequently they knew from the beginning of the trial that there was another charge in existence against the appellant charging him with being in possession of a revolver.

Mr. Austin, Federal Counsel, argued that the evidence relating to the revolver was admissible by section 7 of the Evidence Enactment (Cap. 10) which reads :—

> Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

The fact in issue in this case was whether the appellant was or was not in possession of the ammunition and hand-grenade, the subject matter of the second charge, and it cannot be said that the finding of the revolver was the occasion, cause or effect of that fact in issue.

"Relevant fact" is defined in section 3 as follows :—

> One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Enactment relating to the relevancy of facts.

We are unable to find any provision of the Evidence Enactment which connects the revolver with the subject matter of the second charge, so as to make evidence regarding the revolver admissible in relation to that charge.

We would refer to the case of *R. v. Peckham*[1] cited by Mr. Mills. In that case the prisoner, who was charged upon two indictments, was given in charge of the jury upon one indictment only, but, owing to a misunderstanding, evidence was admitted which was relevant to the other indictment. At page 127 the Lord Chief Justice, delivering the judgment of the Court of Criminal Appeal, said :—

> The appellant was first called upon to plead to both indictments, but he was given in charge to the jury on one indictment only. Nevertheless, the case was opened on behalf of the Crown on all the materials of both indictments, and, as the trial on one indictment proceeded, evidence was given which was relevant only to the other indictment.

At page 128, His Lorship continued :—

> It is enough for the purpose of this appeal that there was misreception of evidence which was relevant only to the other indictment. Such misreception is fatal.....

We agree with the submission of Mr. Mills that the evidence regarding the revolver was inadmissible in a trial which proceeded solely on the second charge, the subject matter of which was ammunition and a hand-grenade. In fact the very essence of the Judge deciding at the commencement of the trial that the two charges should not be tried together at one trial was to protect the appellant from having to defend himself on a two-pronged attack — first as regards the revolver and secondly as regards the ammunition and the hand-grenade. That protection was rendered nugatory by admitting in evidence facts relevant to the first charge only.

We considered carefully whether in view of our finding that the above mentioned evidence should not have been admitted, we could apply the provisions of the proviso to section 29(1) of the Courts Ordinance, 1948, which reads :—

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

Owing to other unsatisfactory features of the trial, which are set out later in this judgment, we are unable to apply the provisions of the proviso just mentioned.

In his summing-up to the Assessors the learned trial Judge said, *inter alia* :—

> "Leaving out the discrepancies about time and so forth, which have been emphasised by the learned Deputy, he" i.e. the appellant "said that he went to this house, went for a bath, came back, and saw the other man doing something with a revolver. Then he was handed one or other of these very thin bags which we know contained a hand-grenade, an article of some weight, and thirty-four rounds of .32 revolver ammunition. He tells you that he held it delicately by his finger and thumb as if he was picking up a dead mouse by the tail, and he asks you to believe that he had no idea what was in this small heavy parcel that had just been handed to him by a man who was cleaning a revolver."

The learned trial Judge must have been confused here because the hand-grenade was never in the bag; it was found on the table with the other 6 rounds of ammunition and the revolver. The contents of the

bag were 28 rounds of revolver ammunition and one round of .303 rifle ammunition. Therefore the directions to the Assessors regarding the appellant holding a bag in which there was a hand-grenade "an article of some weight" are entirely erroneous. Since the learned trial Judge was confused, there is no doubt that the Assessors must have been confused.

Another unsatisfactory feature of this case is that when the Police Armourer gave evidence as to testing the ammunition to see whether it would fire, he said he "examined 16 rounds .32 revolver ammunition, 9 rounds 320 ammunition and 9 rounds 7.65 ammunition". Where the 9 rounds of 7.65 ammunition came from is entirely unexplained. They were never put in evidence by the prosecution witness who took possession of the ammunition found in the bag and on the table at the scene. Yet, in spite of this, the prosecutor made no attempt to clear this up.

A further unsatisfactory feature is that with regard to the hand-grenade, a Police Corporal was called, who gave the following evidence :—

> 7.12.48 accompanied the Sitiawan Magistrate at about 9 a.m. to K. Bahru. At 10 a.m. I went out to sea with him in a boat. In his presence I threw a hand-grenade into the sea. Did not pull out the pin.

There is nothing in his evidence to connect that hand-grenade with the hand-grenade alleged to have been found on the table at the scene, and we cannot imagine why this hand-grenade was taken out to sea and thrown away. In our view this amounts to the destruction of evidence.

Altogether we are constrained to remark that the prosecution in this case was unsatisfactorily conducted.

If the prosecution had framed three charges in this case — first a charge relating solely to the revolver, secondly to the 6 rounds of ammunition and the hand-grenade found on the table, and thirdly to the 28 rounds of revolver ammunition and the one round of .303 rifle ammunition found in the bag, there would have been no confusion if they had proceeded on the third charge only and led evidence relevant to that charge alone. By lumping all the ammunition together — i.e. that found in the bag and that found on the table — and also including the hand-grenade found on the table — there was bound to be confusion, especially in view of the fact that, in our view, it was impossible on the evidence to establish exclusive possession against the appellant with regard to the ammunition and hand-grenade found on the table, bearing in mind that the prosecution themselves had proved the presence in that house of another person (who according to the evidence of the appellant was handling the revolver), who ran away on the arrival of the police.

This Court has previously, in the case of *Tai Chai Keh v. P. P.*[2] drawn attention to the care with which charges should be framed when a firearm and ammunition are found in separate places. In this case the circumstances were such that the ammunition found in the bag, and the ammunition and hand-grenade found in a separate place on the table, should have formed the subject matter of two separate and distinct charges.

For these reasons we have no alternative but to quash the conviction and sentence and order that the appellant be re-tried on a charge relating solely to the ammunition contained in the bag. Pending that re-trial the appellant is remanded in custody.

One further matter raised by Mr. Mills on this appeal is that certain of the ammunition, when tested by the Police Armourer, would not fire, due to the percussion caps being mouldy.

His argument was that unless ammunition is proved to be serviceable — i.e. unless it is proved capable of being fired and therefore is a "live" round — it does not come within the definition of "ammunition" as defined in Regulation 2 of the Emergency Regulations, 1948. That definition reads :—

> 'Ammunition' means ammunition for any firearm as hereinafter defined and includes grenades, bombs and other like missiles whether capable of use with such a firearm or not, and any ammunition containing or designed or adapted to contain any noxious liquid, gas or other thing.

In our view that is an erroneous argument. By that definition a round of revolver or rifle ammunition is ammunition whether when inserted into a revolver or rifle, as the case may be, and the trigger is pressed, it fires or mis-fires. So long as the necessary ingredients of the round are present it matters not — due to the explosive therein being damp for instance — that a mis-fire ensues.

We are fortified in this view by a comparison with the first part of the definition of "fire-arm" in the same Regulation. The first part of that definition reads :—

> 'Fire-arm' means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged.....

That part of the definition of "fire-arm" places the *onus* on the prosecution of proving that the fire-arm is serviceable, but no such *onus* is cast upon the prosecution in the definition of "ammunition".

Retrial Ordered.